

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA**

C.P. (IB) No. 225/KB/2019

IN THE MATTER OF:

An application under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

AND

IN THE MATTER OF:

KUNAL FINANCE AND CREDIT PRIVATE LIMITED, having its registered office at 34, Chittaranjan Avenue, Kolkata 700073.

AND

ARIS CAPITAL PRIVATE LIMITED (previously known as D.D. Computer Pvt. Ltd.), having its registered office at 60C, Colootola Street, Kolkata 700073.

Financial Creditor/Applicant

-Versus-

IN THE MATTER OF:

M/S. TIRUMALA PROJECTS PRIVATE LIMITED, having its registered office at 11/4 Sarat Bose Road, Kolkata 700020.

... Corporate Debtor

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Coram: Shri Jinan K.R., Hon'ble Member (Judicial)

Counsel on Record:

1. MS. URMILA CHAKRABORTY, Advocate]
2. MR. INDRADEEP BASU, Advocate] For Financial Creditor

3. MR. NIRMALYA DASGUPTA, Advocate]
4. MS. ANKITA SHAH, Advocate] For Corporate Debtor

Date of pronouncement of Order: 01/11/2019.

ORDER

Per Shri Jinan K.R., Hon'ble Member (J).

1. CP(IB) No. 225/KB/2019 is an application filed jointly by **M/s. Kunal Finance and Credit Private Limited & M/s. Aris Capital Private Limited**, hereinafter collectively referred as the "**Financial Creditors**" under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016, for initiating Corporate Insolvency Resolution Process (CIRP) as against **M/s. Tirumala Projects Private Limited**, hereinafter referred to as the "**Corporate Debtor**", alleging that the Corporate Debtor committed default in making repayment of unsecured loans to the tune of Rs. 18,00,000/- (Rupees Eighteen Lacs Only) and Rs. 17,00,000/- (Rupees Seventeen Lacs Only) respectively with interest @ 17% p.a. till 01.08.2017.

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2. Brief averment for the consideration of the application is the following:-

- (a) The Financial Creditor had sanctioned and disbursed unsecured loans in the form of Inter Corporate Deposits to the Corporate Debtor to the tune of Rs. 18.00 Lacs and Rs. 17.00 Lacs respectively on 27.12.2013. The loan amount has been disbursed to the Corporate Debtor by way of transfer/RTGS to the Barabazar, Kolkata Branch of Central Bank of India and Colootola Street, Kolkata Branch of Axis Bank Pvt. Ltd. The Inter Corporate Deposits was granted for a period of 120 days which was renewed from time to time with interest @ 17% p.a. from 27.12.2013 and on the request of the Corporate Debtor the rate of interest was reduced to 15% with effect from 01.08.2017.
- (b) The Corporate Debtor had paid interest on the respective loans obtained from the Financial Creditors up to the period of 31st March, 2018 and deducted TDS on such payment of interest by the Corporate Debtor. The Corporate Debtor has admitted the entire amount to be due and outstanding in respect of the Financial Creditors as per the confirmation of accounts issued in favour of the Financial Creditors dated 1st April, 2018 for the period of 1st April, 2017 to 31st March, 2018.

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(c) Thereafter the Corporate Debtor defaulted in the payment and accordingly the Financial Creditors recalled the loan by issuing demand notice on 31st December, 2018 and thereafter on 24th January, 2019. Since there was certain errors in the demand notice dated 31st December, 2018, the Financial Creditors issued revised demand notice on 24th January, 2019. Despite receipt of the demand notice the Corporate Debtor neither made payment nor replied to the demand notice. The Corporate Debtor therefore committed default in repayment of the debt due to the Financial Creditors, the date of default is 5th February, 2019.

3. To prove the above said contentions the Applicants have produced the following documents:-

“Annexure I – Copies of the Master data of the Financial Creditors as available on the website of Ministry of Corporate affairs.

Annexure II – Board resolution

Annexure III – Vakalatnama

Annexure IV – Corporate Debtor’s master data as available on the website of the Ministry of Corporate Affairs.

Annexure V – Written communication in Form 2 by the proposed Interim Resolution Professional, along with the Certificate of Registration of the proposed Interim Resolution Professional.

Annexure VI – Copies of the Bank Statements of the respective Financial Creditors for the relevant period.

Annexure VII – Copies of the relevant Form 26A showing deposit of TDS.

Annexure VIII – Copies of confirmation of Accounts of each of the Financial Creditors.

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Annexure IX – Loan recalling notices dated December 31, 2018 along with postal receipt and tracking report by the postal department.

Annexure X – Fresh Loan Recalling notices dated January 24, 2019, along with postal receipt and tracking report by the postal department.

Annexure XI – Tabulation of the respective loan accounts and the outstanding.”

4. On the strength of the aforesaid documents the Financial Creditors prays for passing an order of admission under Section 7.
5. The Corporate Debtor entered appearance and filed reply disputing the claim of the Financial Creditors. It is contented that the Applicants are not Financial Creditors as defined under the provisions of Insolvency & Bankruptcy Code, 2016. The Financial Creditors do not have any power to transact any business of providing loans to other Corporate Entities. The purported claim of the Financial Creditors is barred by the laws of limitation. The Financial Creditors filed this application suppressing the material facts. The petition filed is incomplete and not in the prescribed form. The applicant has not been properly authorized by the Financial Creditors and even the Board Resolution is defective in nature and the person affirming the petition on behalf of the creditors does not have any proper and valid authority.
6. The Corporate Debtor also submits that Financial Creditors were informed that the disputes between them can be resolved amicably. Despite settling the Financial Creditors filed this application without any

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bonafide reasons. Upon the aforesaid contentions the Corporate Debtor prays for dismissal of this application.

7. Heard both sides. Perused the records and the citations referred to on the side of the Corporate Debtor.

8. This is an application jointly filed by Two Financial Creditors viz., M/s. Kunal Finance and Credit Private Limited (KFCPL) and M/s. Aris Capital Private Limited (ACPL). Both applicants are allegedly Non Banking Financial Companies. However, to strengthen the contention that the Financial Creditors got registration from the Reserve Bank of India, no supporting proof produced despite the written objection on the side of the Corporate Debtor that the Financial Creditors do not have any legitimate right to lend money to the Corporate entities.

9. This application was mainly challenged on the side of the Corporate debtor on 3 (Three) grounds. Firstly, they contented that there is no proper authorization to the Authorised Signatory who signed and verified this application Form I for and on behalf of the Financial Creditors. Secondly, they contented that the Applicants have no legitimate right to lend money and that they have not been holding any license for lending any amount and hence the lending of money by them is illegal and that the debt claimed by the Financial Creditors does not come under the purview of Section 5 (8) of the Code. Thirdly, they contented that the claim of the Financial Creditors, if any is hopelessly barred by Laws of limitation.

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10. The Financial Creditors allegedly lent the money to the Corporate Debtor not on the strength of any written agreement, but on verbal terms. The application was seen filed by an authorized signatory viz., Mr. Tinku Mukherjee. It is contended on the side of the Corporate Debtor that Mr. Tinku Mukherjee has not given any authority as per a resolution passed by M/s. Aris Capital Private Limited and therefore filing of this joint application by Mr. Tinku Mukherjee is bad and is not maintainable.

11. According to the Ld. Counsel appearing for the Financial Creditors, the copy of the resolution passed by the Board of Directors of M/s. Aris Capital Private Limited authorizes Ms. Moushume Hazarika, a Company Secretary of M/s. ACPL to delegate her **powers to officials of the Company** for the purpose of conducting company's business and other related activities including litigation. A reading of the authorization given to Ms. Moushume Hazarika is good. It read as follows:-

“RESOLVED THAT, Ms. Moushume Hazarika, Company Secretary of the Company, be and is hereby authorized to sign, grant authority and delegate powers to officials of the Company for the purpose of conducting company's business and other related activities which shall include, but not limited to, execution of deeds, power of attorney, assignments, contracts, obligations, certificates and other instruments of whatever nature entered into by the Company.”

12. A reading of the above referred resolution passed by M/s. ACPL clearly shows that they empowered Ms. Moushume Hazarika to delegate her power of authority to any of the **officials of the Company**. That means

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she was restricted to delegate the power given to her by the Board of Directors to the Officials of M/s. ACPL and not to any of the officials of any other Corporate person or Company. Nothing is forthcoming to prove that Mr. Tinku Mukherjee who has been authorized by Mrs. Moushume Hazarika as per the above referred resolution dated 3rd September, 2018 that he is the employee of M/s. ACPL. So giving the authorization to Mr. Tinku Mukherjee by Ms. Moushume Hazarika on the strength of the resolution dated 3rd September, 2018 is not legal and proper.

13. The burden is heavy on the side of the Financial Creditors that Mr. Tinku Mukherjee has been given specific authorization to initiate CIRP as against the Corporate Debtor. As per the authorization given by Mrs. Moushume Hazarika who is the company secretary of the M/s. ACPL, Mr. Tinku Mukherjee cannot get a valid authorisation for enabling him to prosecute the case of M/s. ACPL. Accordingly, it appears to me that Mr. Tinku Mukherjee being not specifically authorized by M/s. ACPL, to initiate Corporate Insolvency Resolution Process as against the Corporate Debtor, filing of this application for and on behalf of M/s. ACPL by Mr. Tinku Mukherjee is found not maintainable. However, Mr. Tinku Mukherjee being authorized to initiate CIRP as against the Corporate Debtor vide Resolution dated 5th January, 2019, the filing of this application by Mr. Tinku Mukherjee for and on behalf of Kunal Finance and Credit Pvt. Ltd. is perfectly maintainable.

14. The next objection on the side of the Corporate Debtor is that the Applicants being not an NBFC and not having any license or registration for

lending money, the loan, if any, granted in favour of the Corporate Debtor is illegal and an illegal lending cannot be rectified by way of allowing an application of this nature. According to the Ld. Counsel for the corporate debtor even if the applicants are found NBFC the debt claimed is not a financial debt under the purview of section 5(8) of the Code and therefore this application is not maintainable.

15. According to the Ld. Counsel for the financial creditors, the Applicants are Non Banking Finance Companies registered under the provisions of the RBI, Act. However, no data regarding the registration seen pleaded in the application and copy of the registration certificate has not produced. The Ld. Counsel appearing for the corporate debtor referring to Section 186 of the Companies Act, 2013 also attempted to substantiate his submission that the alleged Inter Corporate Loan is in violation of Section 186 of the Companies Act, 2013. According to him as per sub Section 2(a) of Section 186 of the Companies Act, 2013, a Company "*shall not give any loan to any person or other body corporate exceeding 60% of its paid up share capital, free reserves and securities premium account or one hundred percent of its free reserves and securities premium account, whichever is more*". Reading the said provision, he would submit that lending of money is illegal and illegal lending of money cannot be legalized by admitting this application.

16. This application being filed under Section 7, it appears to me that the question as to whether giving an inter corporate loan to the Corporate Debtor in violation of any of the provisions of the Companies Act, 2013,

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does not arise for consideration. Moreover, nothing is brought out on the side of the corporate debtor, to prove that the Inter Corporate Loan allegedly given to the Corporate Debtor violated sub Section 2 (a) of Section 186 of the Companies Act, 2013.

17. At this juncture, the Ld. Counsel for the Corporate Debtor submits that the debt allegedly payable to the Financial Creditors is not a debt within the meaning of Section 5 (8) of the Code. According to him, admission regarding payment of interest and deduction of tax during the Financial year ending 31.03.2017 does not at all help the Financial Creditors to succeed unless and until the Financial Creditors prove that the loan was granted to the Corporate Debtor bears interest or the amount disbursed in favour of the Corporate Debtor is against the consideration for the time value of money. According to him, none of the said ingredients is satisfied in the case in hand and hence this application is liable to be dismissed on the said ground itself.

18. Admittedly there was no agreement entered into between the Corporate Debtor and the alleged Financial Creditors. It is contended on the side of the Financial Creditors that Rs. 18.00 lacs was granted by M/s. KFCPL on 27.12.2013 for a period of 120 days with an oral agreement to renew from time to time with interest @ 17% p.a. from 27.12.2013. Similarly, ACPL lent Rs. 17.00 lacs for a period of 120 days which was allegedly renewed from time to time with interest @ 17% p.a. and that the Corporate Debtor was in the habit of paying interest at the above said rate up to the period of 31st March, 2018 and that the rate of interest was

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renegotiated and reduced to 15% from 01.08.2017. According to the Ld. Counsel for the financial creditors, since the corporate debtor committed default in payment of interest subsequent to 31.03.2018, the loan was recalled respectively by issuing demand notice dated 24th January, 2019 and the default according to the Financial Creditors was from 5th February, 2019.

19. The Ld. Counsel for the corporate debtor cited **Sanjay Kewalramani vs. Sunil Parmanand Kewalramani & Ors [Company Appeal (AT) (Insolvency) No. 57 of 2018 of NCLAT, New Delhi dated 12th July, 2018]**, for highlighting an argument that occasional payment of interest is not enough to hold that lending money by the financial creditors falls with in the purview of section 5(8) of the Code. The Hon'ble Appellate Tribunal in the above said case has held that –

“Mere fact that the Company paid interest @ 12% per annum, during certain period cannot be the ground to hold that the ‘debt’ comes within the meaning of ‘Financial Debt’ to treat the 2nd and 3rd Respondents as ‘Financial Creditors’. As we find that 1st Respondent who signed and filed the application under Section 7 of the ‘I&B Code’ was not eligible to file the application not being a ‘Financial Creditor’, as held by the Adjudicating Authority, we hold that the petition at the instance of 2nd and 3rd Respondents were also not maintainable.”

20. The facts in the aforesaid case is similar to the facts in the instant case. The financial creditors failed to produce any proof to prove that the loan granted in favour of the Corporate Debtor was renewed from time to

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time with effect from 27.12.2013 and interest @ 17% has been paid on the side of the Corporate Debtor till 31.03.2018. What is relied upon on the side of the Financial Creditor is a confirmation of account for the period 1st April, 2017 to 31st March, 2018 signed by the corporate debtor. As per the said confirmation of account balance due from the Corporate Debtor to the KPCL is Rs. 18.00 lacs with effect from 1st April, 2017 and Rs. 17.00 lacs w.e.f. 1st April, 2017. The above said confirmation of account evidently given by the Corporate Debtor does indicate that interest has been paid till March 2018. The said confirmation of balance account was seen dated 01.04.2018.

21. The burden is heavy on the side of the Financial Creditors to prove that the Applicants are Financial Creditors and that the debt due to the Financial Creditors is the Financial Debts as defined under Section 5(8) of the Code. As per Section 5 (8), "Financial Debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes:-

- (a) Money borrowed against the payment of interest;*
- (b) Any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;*
- (c) Any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;*
- (d) The amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;*

- (e) *Receivables sold or discounted other than any receivables sold on non-recourse basis;*
- (f) *Any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;*
[Explanation, - For the purposes of this sub-clause –
- i) Any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and*
 - ii) The expressions, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016;]*
- (g) *Any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;*
- (h) *Any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;*
- (i) *The amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clause (a) to (h) of this clause.”*
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22. In order to substantiate that the Corporate Debtor borrowed the money against the payment of interest no proof seen produced on the side of the Financial Creditors. Admittedly there was no agreement entered into between the Financial Creditors and the Corporate Debtor. In the said background can we uphold the contention that there was an oral agreement between the Financial Creditors and the Corporate Debtor

agreed to pay interest @ 17% p.a. till 1.8.2017 and thereafter at the rate of 15% p.a. as contended by the Financial Creditors, and that the corporate debtor committed default in payment of interest and repayment with effect from 05.02.2019 as alleged. Evidence is lacking to hold so.

23. It is specifically pleaded in the application that the period of lending the loan expired 120 days from 27.12.2013. There is no evidence forthcoming to prove that it has been renewed orally as alleged. In the said background can we rely upon the confirmation of account which has been approved by the Corporate Debtor on 1st April, 2018 that too an interest to be due from 1st April, 2017 onwards and not before that. The confirmation of account does not indicate that there was a renewal of loan as alleged and there was payment of interest @ 17% on the side of the Corporate Debtor. The contention that interest from the date of lending till 31.03.2018 has been paid by the corporate debtor cannot be an indication that the Corporate Debtor has paid the above said interest and renewed the loan as alleged.

24. In **Sanjay Kewalramani vs. Sunil Parmanand Kewalramani & Ors case** Applications were filed jointly by 3 (Three) Financial Creditors alleging granting of unsecured loan. There was no agreement entered into between the parties. However evidence was led in proving payment of interest @ 12% p.a. The Hon'ble Appellate Tribunal has held that mere payment of interest @ 12% p.a. during certain period cannot be a ground to hold that the debt comes under the purview of sub Section (8) of Section 5 of the Code.

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25. The above said preposition is squarely applicable in the case in hand. When exactly the default has occurred there is no clear data available in the case in hand. In the Form I in para IV sl. No. 1 it is written that the granting of loan is for a period of 120 days and that interest up to 31.03.2018 has been paid. The default according to the Operational Creditor as per Form No. 1 para IV sl. No. 2 is 04.02.2019. How the Applicants have arrived the date of default as 04.02.2019 is not at all clear. According to the Ld. Counsel for the Financial Creditor, they recalled the loan because of the default, by issuing demand notice on 24th January, 2019 and directed to repay the debt within 7 days of the receipt of the demand notice and therefore, the date of default is 05.02.2019. If it is so, the date of default shown in the form is inconsistent with that of the subsequent pleading in the application.

26. In the above circumstances, by applying the preposition laid down on the above said judgment of the Hon'ble Appellate Tribunal, it appears to me that the debt claimed on the side of the Financial Creditors is not the Financial Debt falls under the purview of Section 5(8) of the Code and accordingly the claim put forward by the Financial Creditor under Section 7 is not at all maintainable.

27. The 3rd and last objection raised on the side of the Corporate Debtor is that even if the debt is found to be a Financial Debt come under the purview of Section 5(8), the filing of this application on 05.02.2019 is hopelessly barred by limitation. According to him, as per the allegation on the side of the Applicant, the period of granting loan expires 120 days from 27.12.2013 and there is no proof of renewal of the loan as alleged on the

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side of the Financial Creditors and filing of the application on 05.02.2019 is not within time.

28. I find some force in the submission on the side of the corporate debtor. Since the Financial Creditors based their claim on the strength of terms and conditions orally agreed into, necessarily supporting proof would have been produced on the side of the Financial Creditors to prove that interest had been paid for a period of 120 days from 27.12.2013 and thereafter the loan was renewed from time to time by paying interest for the remaining 120 days. So, unless and until such an evidence is forthcoming on the side of the Financial Creditors, the right to sue as per the averment in the application would occur on the expiry of 120 days from 27.12.2013 and therefore filing of this application on the strength of confirmation of accounts dated 1st April 2018, cannot save the period of limitation. The said confirmation was after the expiry of the period of limitation. Now the law is settled as regards the application of under article 137 of the Limitation Act, 1963 in the nature of the case in hand.

29. **In Gaurav Hargovindbhai Dave vs. Asset Reconstruction Company (India) Ltd. & Anr reported in Civil Appeal No. 4952 of 2019**, the Hon'ble Supreme Court has reiterated that in a case of this nature Article 137 shall apply. That being so, the period of limitation would not be from the date of confirmation of balance account because a fresh period could not start as it was not within three years of expiry of period of limitation from the date of alleged lending. Accordingly, this application is also found not filed in time. The application is also barred by laws of limitation. In view of what

is discussed above it appears to me that this is not a fit case for passing an order of admission. Accordingly, the application filed under Section 7 by the Financial Creditors is liable to be dismissed with no order as to costs.

30. In the result **C.P. (IB) No. 225/KB/2019** is dismissed.

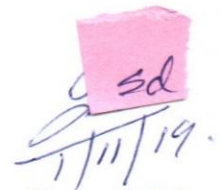
31. Registry is hereby directed under section 7(4) of the I & B Code, 2016 to communicate the order to the Financial Creditor and the Corporate Debtor by Speed Post as well as through E-mail.

32. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.



(Harish Chander Suri)

Member (T)



(Jinan K.R.)

Member (J)

Signed on this, the 1st day of November, 2019.

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